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IN THE HIGH COURT OF SOUTH AFRICA
KWAZULU-NATAL DIVISION, PIETERMARITZBURG

Appeal Case No: A 2025 – 091983

Case No: 19051/2023

In the matter between:

THE SOUTH AFRICAN RESERVE BANK	**FIRST APPELLANT**
PRUDENTIAL AUTHORITY	
JOHANNES GEORGE KRUGER N.O.	**SECOND APPELLANT**

and

ITHALA SOC LIMITED	**FIRST RESPONDENT**
ABSA BANK LIMITED	**SECOND RESPONDENT**
MEC FOR ECONOMIC DEVELOPMENT, TOURISM	**THIRD RESPONDENT**
AND ENVIRONMENTAL AFFAIRS	
PREMIER OF KWAZULU-NATAL	**FOURTH RESPONDENT**

ORDER

On appeal from: the KwaZulu-Natal Division of the High Court, Pietermaritzburg (Ncube J, sitting as court of first instance):

1. The appeal is upheld.

2. The section 18(3) execution order issued on 9 May 2025 is set aside with costs.

3. The first, third and fourth respondents to pay the costs of two counsel employed in respect of each of the appellants on Scale C jointly and severally the one paying the others to be absolved.

JUDGMENT

Nkosi DJP (Harrison J and Saks AJ concurring)

Introduction

[1] This is an appeal by the South African Reserve Bank Prudential Authority ("the PA") and Johannes George Kruger N.O. ("the RA") in terms of s 18(4)(ii) of the Superior Courts Act 10 of 2013 ("the Act"). The appellants appeal the judgment and order of Ncube J which was delivered on 9 May 2025.

[2] The following order forms part of this appeal:

'1. Mr Kruger in his capacity as Repayment Administrator, is granted leave to appeal against this court's judgment and order of 13 November 2024, to the Supreme Court of Appeal.

2. In terms of section 18 (3) of the Supreme Courts Act 10 of 2013, the orders granted by this Court on 13 November 2024 in respect of Ithala's counter application, shall continue to operate, and be given effective to immediately, pending the outcome of an appeal for which leave is given. For avoidance of doubt, those orders are the following:

2.1 It is declared that the appointment of the first respondent as Repayment Administrator in terms of section 84 of the Bank Act 94 of 1990 does not affect the normal operations of Ithala SOC Limited which do not constitute deposit-taking as contemplated in section 1 read with section 84 of the Banks Act.

2.2 It is declared that the first respondent, in his capacity as Repayment Administrator does not have operational and management control over the day-to-day operations of Ithala SOC Limited, which do not amount to the business of a bank or constitute deposit-taking activities.

2.3 It is declared that the first respondent, in his capacity as Repayment Administrator, has no authority to take over the human resource, treasury, market, finance, and any other operational functions of Ithala SOC Limited, including the removal of Ithala's authorised signatories to the bank accounts used for purposes of these functions.

2.4 It is declared that notwithstanding the appointment of the first respondent as a Repayment Administrator, the Board of Ithala SOC Limited is not divested of its management powers and responsibilities as contemplated in the Companies Act and Chapter 6 of the Public Finance Management Act.

2.5 It is declared that the first respondent may not interfere with the management powers of the Ithala SOC Limited board save insofar as it is necessary to ensure that the assets of Ithala SOC Limited are not dissipated to prevent the Repayment Administrator from performing his functions in terms of section 84 of the Banks Act.

3. Absa Bank Limited ['Third Respondent'] is interdicted and restrained from refusing to process any debit transactions in any of Ithala's bank accounts relating specifically to employees' payroll (such as salaries), pensions, medical aid, ill-health, disability insurance and UIF and any other operational expenses relating to the business of Ithala SOC Ltd.

4. The Third Respondent is interdicted and restrained from refusing to accept instructions from Ithala SOC's authorised signatories to its bank accounts in respect of payments in relation to the expenditure referred to in paragraph 2 above.

5. It is declared that pending the final outcome of the liquidation application, Ithala is entitled to continue conducting its business in the ordinary course [excluding prohibited deposits as defined in section 1 of the Banks Act] and to pay expenditure relating to its employees and other operational expenditure in the ordinary course of business.

6. The first respondent [Repayment Administrator] is interdicted and restrained from issuing any instructions:

6.1 To Ithala bankers, including the Third Respondent, in connection with any bank account held in the name of Ithala for purposes of preventing debits from being processed in these accounts.

6.2 To any service providers of Ithala to cease performing any services currently provided by them to the applicant under any contract to which the applicant is a party.

6.3 To the Third Respondent which have the effect of preventing Ithala's ordinary debtors from fulfilling their financial obligations to Ithala.

7. All issues of costs are reserved for determination by the Supreme Court of Appeal.'

[3] The above order is a *sequelae* to a similar earlier order ("the main order") issued on 13 November 2024 by Ncube J in which he ordered as follows:

'1. The Repayment Administrator's Application is dismissed with costs.

2. The Ithala's Counter Application is granted, to the following extent:

2.1 It is declared that the appointment of the Applicant as repayment administrator in terms of section 84 of the banks Act 94 of 1990 does not affect the normal operations of ITHALA SOC Limited which do not constitute deposit-taking as contemplated in section 1 read with section 84 of the Banks Act.

2.2 It is declared that the Applicant, in his capacity as repayment administrator does not have operational and management control over the day-to-day operations of ITHALA SOC Limited, which do not amount to the business of a bank or constitute deposit-taking activities.

2.3 It is declared that the Applicant, in his capacity as repayment administrator, has no authority to take over the human resource, treasury, marketing, finance, and any other operational functions ITHALA SOC Limited, including the removal of Ithala's authorised signatories to bank accounts used for purposes of these functions.

2.4 It is declared that notwithstanding the appointment of the Applicant as a repayment administrator, the Board of ITHALA SOC Limited is not divested of its management powers and responsibilities as contemplated in the Companies Act, Chapter 6 of the Public Finance management Act.

2.5 It is declared that the Applicant may not interfere with the management powers of ITHALA SOC Ltd board save insofar as it is necessary to ensure that the assets of ITHALA SOC Limited are not dissipated to prevent the repayment administrator from performing his functions in terms of section 84 of the Banks Act.

3. The Applicant is ordered to pay the costs of this counter application, including the costs of 3 counsel.'

[4] This court hears the matter in terms of s 18(4)(iii) of the Act.

Background

[5] This matter contains the following historical and litigation background. The PA, who is a juristic person established in terms of s 32 of the Financial Sector Regulation Act 9 of 2017, would grant and issue exemption notices to the first respondent

("Ithala"), a State-owned company established in terms of the KwaZulu-Natal Ithala Development Finance Corporation Act 5 of 2013 ("the IDFC Act"), to accept deposits from customers in terms of s 1(1)(cc) of the Banks Act 94 of 1990 ("the Banks Act"). Pursuant thereto, Ithala who is not a bank, has been accepting deposits from customers for many years, which constitutes "the business of a bank".

[6] It is common cause that a Final Exemption Notice was issued to Ithala on 22 July 2022 and which was to expire on 15 December 2023.[1] In terms of the Notice, Ithala was advised that the notice was granted to afford Ithala an opportunity to regularise its affairs as required; and thereafter apply for authorisation from the PA to establish a bank or mutual bank. Ithala was also directed to maintain a separation between lending activities and any deposit-taking activities. It appears to be an established fact that Ithala failed to comply with the conditions contained in the Notice.

[7] Before the lapse of the Final Exemption Notice, Ithala applied for a new exemption as it could no longer accept deposits from members of the public. The PA rejected Ithala's application. Thereafter, Ithala brought an urgent application for an interim interdict pending a review of the PA's decision to refuse to grant an extension, which culminated in the judgment of Moshoana J who dismissed the application.[2] The review application brought by the KwaZulu-Natal provincial government relating to conditions contained in the Exemption Notice was also dismissed (per Millar J).[3]

[8] Despite the expiry of the Final Exemption Notice, Ithala continued to accept deposits from the public and failed to assure the PA, as requested, that it would cease to do so. The PA then appointed the RA, in terms section 11 (1), read with section 12(1) of the South African Reserve Bank Act 90 of 1989, on 12 December 2023, to undertake repayments of deposits collected unlawfully by Ithala, and on 15 December 2023, on which date it issued a directive in terms of s 83(1) of the Banks Act directing Ithala to repay all monies obtained contrary to the provisions of the Banks Act. On the same date, the PA also brought an urgent application against Ithala in the North

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[1] Published under GN 1169, *GG* 47063, 22 July 2022.
[2] *Ithala SOC Ltd v SA Reserve Bank and Others* [2022] ZAGPPHC 784.
[3] *MEC for Economic Development, Tourism and Environmental Affairs, KwaZulu-Natal and Another v South African Reserve Bank Prudential Authority and Others* [2023] ZAGPPHC 1182.

Gauteng High Court, Pretoria seeking a declaration that Ithala is not entitled to continue taking deposits from the public, and asking for other ancillary relief.

[9] On 20 December 2023, the parties reached an agreement which was made an order of court, by consent between the parties ("the consent order"). The consent order (per Leso AJ) provided for the lapse of the exemption on 15 December 2023; directed that Ithala was not entitled to continue to take any deposits; directed Ithala not to deal with any deposits already received other than under the direction of the RA, as appointed by the PA, and any repayment plan put in place; and empowered the RA to recover and take possession of all deposits taken by Ithala from depositors or under its control in terms of the Banks Act.

[10] Despite the aforesaid consent order, the RA brought an urgent application to this court, on an ex parte basis and to be heard in camera, seeking leave to institute proceedings against Ithala in terms of s 84(1A)*(b)*(ii); to take possession of all the assets of Ithala in terms of s 84(1A)*(b)*(i); and act in accordance with s 84(4) read with ss 84(5) and 84(8) of the Banks Act. On 22 December 2023, this court (per Mossop J) granted the relief sought on an interim basis with a return date,.

[11] The interim order was subsequently reconsidered (per Veerasamy AJ) in terms of Uniform rule 6(12)*(c)*, the rule nisi was discharged and the application struck from the roll with costs. On 20 February 2024, Ithala sought an order in the North Gauteng High Court, Pretoria which would allow it to take deposits from members of the public. The application was made pursuant to paragraph 2.2 of the consent order on the basis that if Ithala ceased taking deposits, this will lead to its downfall. The application was dismissed (per Makhoba J) with costs. The application for leave to appeal that order; and the petition for leave to appeal to the Supreme Court of Appeal ("the SCA"), in April 2024 and 26 June 2024 respectively, was unsuccessful. The application for reconsideration of the special leave to appeal by the SCA, in terms of s 17(2)*(d)* of the Act, is pending.

[12] On 10 April 2024 the RA re-enrolled the matter (on an urgent basis and on amended papers) seeking similar relief that he be empowered to recover and take possession of all the assets of Ithala in terms of the relevant provisions of the Banks

Act. Ithala opposed the application and filed a counter-application for declaratory orders.

[13] At the hearing of the matter, the court a quo analysed the provisions of s 84 (1A)*(b)*(i) in tandem with those in s 83(1) of the Banks Act and concluded that although subsec (1A)*(b)*(i) entitles the repayment administrator to take possession of all the assets of the person subject to relevant direction, both ss 83 and 84 are concerned only with the repayment, management and control of money which was unlawfully obtained. Put differently, the court found that the repayment administrator is entitled to recover and take possession of only those assets which were acquired using money, which was unlawfully obtained, or only those assets into which money unlawfully obtained had been converted.

[14] The court considered money "unlawfully obtained" to refer to money which the person obtains from the activities of running the business of a bank in contravention of the provisions of the Banks Act, or without being authorised by the PA. The court found that the RA must prove entitlement to assets acquired using money obtained after 15 December 2023, which is the date on which the exemption granted came to an end.

[15] The court also noted that the RA's letter of appointment by the PA excluded Ithala's assets and was confined to the repayment of the monies or the deposit-taking activities of Ithala. The court sourced support for its findings in the PA's letter to the Chairperson of the Board of Directors of Ithala, and the PA's affidavit in support of the application in the Gauteng Division (which relates to the consent order) which only refers to the deposit taking activities, and where it is clearly stated that other business activities of Ithala would remain unaffected.

[16] From the foregoing, the court a quo concluded that:

(a) it was not a mistake to exclude Ithala's assets from the PA's appointment letter;

(b) the RA is a creature of statute and his powers are defined and determined by the statute which creates him;

(c) the powers granted to the RA are stated in paragraph 2(b) of the Schedule attached to his appointment letter; and

(d) the RA was precluded from taking Ithala's entire business operations which do not constitute deposit-taking activities and which were to remain unaffected.

[17] On some of the relief sought in the counter-application, the court concluded that it closely related to the business of a bank as defined in the Banks Act and was incompetent and could not be granted. Only the relief which entitled Ithala to continue with its normal business operations to which the RA had no powers to control i.e. matters other than those set out in s 84(4)*(a)* and *(b)* of the Banks Act were granted.

[18] On 15 January 2025, the PA instituted a liquidation application against Ithala. Then, on 16 January 2025 the RA issued an instruction to Absa Bank to place an immediate hold on all transactions flowing into and out of Ithala's Absa accounts. As a result, all transactions on Ithala's Absa accounts ceased, causing Ithala's customers not to be able to transact on their accounts including making payments and receiving their salaries as well as their Sassa grants.

[19] The RA also launched an application for leave to appeal the main order to the SCA. In response, Ithala launched an application for immediate implementation of the counter order (mentioned in paragraph 3) granted against the RA in terms of s 18(1) and (3) of the Act. Ithala also filed an Amended Notice of Motion, dated 22 January 2025, to join Absa Bank as the third respondent, seeking certain interdictory relief against it.

[20] The RA's leave to appeal and Ithala's application for immediate implementation of the counter order were heard together.

[21] The court a quo considered that ordinarily and in terms of s 18(1) of the Act, the operation and execution of an order which is the subject of an appeal is suspended pending the decision of the appeal unless an applicant, on a balance of probabilities shows the existence of exceptional circumstances; and that it will suffer irreparable harm while the appellant will not suffer the same if the court orders should continue. The court also considered that exceptionality must be fact-specific i.e. the exceptional circumstances must be derived from the actual predicaments in which the litigants find themselves.

[22] The court a quo traversed the difficulties which the RA's instructions had put to bear on Ithala's business, its service providers and its customers as contained in the affidavit deposed to by its CEO. The court found that the facts placed before it by Ithala were exceptional enough to warrant the relief sought, ostensibly on the basis that the RA's actions had placed Ithala in a very difficult position, making its future uncertain and had interfered with its day-to-day business operations which do not constitute deposit-taking activities, the conduct which was prohibited in terms of the main order of 13 November 2024.

[23] The court also noted that Ithala would be forced to shut its doors of business with the following irreparable harm to incur:

(a) members of the public will suffer as poor Sassa grant recipients will not be able to access their grants;
(b) customers, in general, will not be able to access their funds;
(c) Ithala's employees might be forced to resign as they are not being paid their salaries and cannot honour their monthly financial obligations including support for their children;
(d) unpaid service providers might sue Ithala for failing to pay them for services rendered; and
(e) due to non-payment of rent, Ithala stands to be evicted from its leased premises.

[24] In comparison to the above-noted irreparable harm, the court found that the appellants would suffer no irreparable harm. The court firstly noted that there was no application for leave to appeal the main order by the PA. Secondly, the appellants can still prosecute the appeal (on the main order) whilst Ithala continues with its normal business operations which do not constitute deposit-taking activities. Thirdly, the Minister of Finance has promised to guarantee the deposits and therefore there is no risk of deposits being depleted.

[25] Accordingly, the court concluded that Ithala stands to suffer irreparable harm if the application to execute is not granted. Conversely, the court concluded that the

appellants would suffer no irreparable harm if the application is granted – hence the order mentioned in paragraph 2 above.

[26] In terms of s 18(4)*(a)*(i) of the Act the court advanced the following reasons for its order:

'1. There is urgent need to resolve the impulse (*sic)* between Ithala and the Prudential Authority for the benefit of the Ithala's banking community and the public at large.

2. The RA has stopped Ithala's day to day business operations even those which do not constitute deposit taking activities. If the situation is allowed to continue, Ithala business will collapse and that will be to the detriment of members of the public who make use of this institution.

3. The embargo on the payment of salaries of staff has a devastating effect on their lives and lives of their family members including children.

4. At the moment, Ithala is unable to meet its financial obligations to service providers which might expose Ithala to unnecessary litigation.

5. If the Ithala issue is not resolved urgently, business as well as personal loans including bonds will not be paid back to Ithala.

6. Ithala is paying rent in respect of some of its premises and if rent is not paid because of frozen accounts, Ithala is liable to be evicted from those premises.

7. Ithala has a statutory obligation to make deductions from staff salaries and pay over to SARS and other organisations like UIF and labour for payment of workmen's compensation. Ithala is likely to be exposed to prosecution if it does not pay over those contributions.

8. There is a need for the Supreme Court of Appeal to give a clear interpretation of Section 84 (1A)(b)(i) of the Banks Act in respect of a financial institution, which is not a ponzi scheme and not a "*person*" as defined in the Banks Act and where the letter of appointment of the RA clearly excludes the assets.

9. There was no reason for the RA to put embargo on Ithala's accounts with Absa in clear disregard of this court's order of 13 November 2024. If the instruction to Absa was given before this court's order was granted, such instruction had to be withdrawn after the court order was handed down. Failure to withdraw the instruction is a clear disrespect for the Rule of Law and it borders on contempt of court.'

[27] Absa Bank did not participate nor did it oppose the interlocutory relief sought by Ithala against it. It indicated that it would abide the order of the court.

[28] On 24 May 2025, the PA was joined as a party to the proceedings. It made common cause with the RA in opposing Ithala's counter-application.

[29] This appeal is assailed by Ithala. The third and fourth respondents (as intervening parties) have been joined in the appeal by agreement between the parties in terms of the order granted (per Poyo Dlwati JP). All parties have filed their heads of arguments and presented oral arguments in the appeal as directed in the order.

Issues on appeal

[30] The issues in this appeal are:

(a) firstly, whether or not exceptional circumstances exist which warrant the exercise of the courts' powers under s 18(1) and (3) of the Act;

(b) secondly, whether Ithala proved the following:

  (i) the presence of irreparable harm to Ithala if the main order granted on 13 November 2024 was not put into operation with immediate effect; and

  (ii) the absence of irreparable harm to the RA who seeks to appeal the main order.[4]

[31] In *University of the Free State v Afriforum and Another*[5] the court made it clear that prospects of success in the appeal remain a relevant consideration in deciding whether or not to grant the exceptional relief.[6]

Appellants' submissions

[32] The appellants assail the judgment/execution order and the reasoning of the court a quo. I will deal with their submissions together as they are intertwined and

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[4] See *Knoop NO and Another v Gupta (Execution)* [2020] ZASCA 149; 2021 (3) SA 135 (SCA) para 45; *Incubeta Holdings (Pty) Ltd and Another v Ellis and Another* 2014 (3) SA 189 (GJ) paras 16, 18, 22 and 24; *Tshwane Metropolitan Municipality v Vresthena (Pty) Ltd and Others* [2023] ZASCA 104; 2023 (6) SA 434 (SCA) para 14; and *Ntlemeza v Helen Suzman Foundation and Another* [2017] ZASCA 93; 2017 (5) SA 402 (SCA) paras 46-47.

[5] *University of the Free State v Afriforum and Another* [2016] ZASCA 165; 2018 (3) SA 428 (SCA) paras 14-15 ("*Afriforum*").

[6] See also *Minister of Social Development Western Cape and Others v Justice Alliance of South Africa and Another* [2016] ZAWCHC 34 para 27.

interlinked. Those submissions which seem to argue the merits of the appeal of the main order (to the SCA) will be jettisoned.

[33] The appellants submit that Ncube J in the court a quo committed various errors in his orders and reasoning in the following respects:

(a) Ithala failed to establish exceptional circumstances and the absence of irreparable harm to depositors. The Minister of Finance has not issued a guarantee against deposits as this was the only basis for the finding of the absence of irreparable harm to the PA or the public interest. The guarantee, it is submitted, is both a legal and factual fallacy because the details about processing of the guaranteed funds by National Treasury (which the Minister undertook to secure as far as possible) will be provided after the liquidation application has been finalised, and the Minister subsequently proposed to provide a loan to the provincial government of KwaZulu-Natal, alternatively to issue a guarantee to a registered bank so as to allow for the orderly transfer of the entire depositors book of Ithala to such a registered bank to facilitate the repayment of the depositors' fund. Bearing in mind the processes and procedures that ought to be followed prior to the issuing of a guarantee (in terms of s 70 of the Public Finance Management Act 1 of 1999 ("the PFMA"), there is no lawful or binding guarantee that can be issued by the Minister until the process envisaged in s 70 has been completed.[7] The aforesaid situation, it is submitted, militates against the relief that was granted by the court;

(b) the s 18(3) application was an abuse of court process as it relates to the freezing of deposits which was put into effect pursuant to the PA's liquidation application and is completely unrelated to the application that culminated in the main order now subject to an appeal. Consequently, the relief pertaining to the lifting of the embargo on deposits does not fall under the rubric of s 18(3) and Ithala's application should have been dismissed on this basis;

(c) Ithala's case presented in a supplementary founding affidavit (in the main action) was not that the guarantee from the Minister of Finance was in place but rather that there was an undertaking to issue a guarantee. Such an undertaking to guarantee is unenforceable, it is analogous to an agreement to

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[7] *Comair Limited v South African Airways (Pty) Ltd* [2017] ZAGPJHC 10 para 17.

agree which have no enforceable effect.[8] Thus, there is nothing that could ameliorate the irreparable harm that the public interest will suffer as a result of the execution of the order pending the appeal;

(d) the decision to freeze bank accounts containing depositors' deposits was taken by the RA in terms of s 84(1A)*(b)* of the Banks Act and remains in place and has binding consequences. The decision cannot simply be ignored and/or interdicted, irrespective of Ithala's views as to its legality, without the decision being reviewed and set aside, which relief was not sought;[9]

(e) the judgment of the court goes against the banking regulatory framework and the natural consequences of the conditions in the Final Exemption Notice. The failure of Ithala to comply with the conditions in that Notice, would result, firstly, in the appointment of a repayment administrator to take control of Ithala, secondly, in the winding down of Ithala's deposit taking activities. Contrary to what the court found, the RA was appointed to deal with two categories of deposits, firstly, deposits that were lawfully taken in terms of the Exemption Notice up until 15 December 2023, and secondly, deposits that were taken by Ithala after the lapse of the Exemption Notice and contrary to the consent order granted on 21 December 2023;

(f) the court failed to place sufficient weight on the fact that was common cause i.e. contrary to the banking regulatory regime that Ithala was authorised to conduct deposit taking activities, it co-mingled its other funds and deposits from depositors. The co-mingling of funds is so embedded that the accounts dedicated for its operational and other expenses and those strictly for deposit taking activities cannot be delineated. The effect thereof is that the uplifting of the embargo on bank accounts, all of which contain deposits, heightened the risk of a run on deposits, which run is not limited to depositors but includes employees of Ithala who would want to withdraw their deposits as soon as the bank accounts are unfrozen, especially since there is a pending liquidation application against Ithala. So it is submitted, the relief sought by Ithala and

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[8] *Premier, Free State, and Others v Firechem Free State (Pty) Ltd* 2000 (4) SA 413 (SCA); *Letaba Sawmills (Edms) Bpk v Majovi (Edms) Bpk* 1993 (1) SA 768 (A).

[9] *Oudekraal Estates (Pty) Ltd v City of Cape Town and Others* 2004 (6) SA 222 (SCA) para 26; *Merafong City v AngloGold Ashanti Ltd* [2016] ZACC 35; 2017 (2) SA 211 (CC) para 42.

granted by the court, is incompetent and there are no safeguards for depositors who stand to suffer irreparable harm;

(g) the interdictory relief granted by the court was unrelated to the s 18(3) application and was also, on its own, incompetent as it interdicts and restrains something that had already taken place by the time it was granted. Only a review application could reverse that position;

(h) the PA has launched an application for the provisional liquidation of Ithala in terms of s 84(1A)*(c)* of the Banks Act as a result of the solvency report of the RA. The order that was granted undermines the purpose of the liquidation application since Ithala accepts that it does not have resources to pay all deposits. The liquidation is intended to enable an orderly repayment of deposits. The s 18(3) judgment undermines the possibility of depositors obtaining their full deposits which is accentuated by the fact that there is no evidence of a guarantee being issued. The judgment and order irremediably harms the interests of depositors, and this is relevant to the consideration of harm under the interim interdict;

(i) the appellants do not represent their own interests under the Banks Act before the court. They represent the interests of depositors and the financial system;[10]

(j) in terms of s 341(2) of the Companies Act 61 of 1973 ("the old Companies Act") any disposition or transfer of Ithala's property/assets in the face of the application for provisional liquidation is void unless the court directs otherwise. Therefore, by operation of law, the amounts sought to be paid from the frozen accounts to employees and the service providers cannot be paid outside of the liquidation process, as any payment would give undue preference to some creditors over others. That may even lead to a run on deposits on Ithala because employees would want to take out all of their deposits given the pending liquidation application – which would be detrimental to the depositors themselves and the country's financial systems because Ithala will not be able to satisfy such large withdrawals if depositors descended on its branches and sought to make withdrawals;

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[10] *Ntlemeza v Helen Suzman Foundation and Another* [2017] ZASCA 93; 2017 (5) SA 402 (SCA) paras 46 and 47.

(k) the court conflated the execution of the main order with the decision to place an embargo on the deposits. The relief pertaining to the unfreezing of deposits was not supposed to be determined under s18(1) and (3) of the Act because that issue was not before court when the main order was granted on 13 November 2024. Section 18(1) confines applications under s 18(3) to instances where the operation and execution of a judgment and order, which is the subject of an application for leave to appeal or of an appeal, is suspended pending the decision of the application or the appeal. Section 18(3) reverses the default position, wherein an order that is otherwise subject to an application for leave to appeal or of an appeal, is under exceptional circumstances, put into operation and execution pending the application for leave to appeal or the appeal. On the other hand, the freezing of deposits is a self-standing exercise of power by the RA. Section 18(1) and (3) therefore do not find any application to the RA's decision to place an embargo on the deposits because that decision arises from a completely unrelated event, i.e. the liquidation application;

(l) the s 18(3) application was devoid of merit as there were no exceptional circumstances that warranted the granting of the relief. Ithala knew what the effect of its failure to obtain a banking licence would be. It would be the winding down of its deposit taking activities and the RA taking control of its business affairs. Consequently, if Ithala has to shut down its deposit taking activities as a consequence of its failures to act responsibly and ensure that it complies with the banking regulatory framework, that eventuality is consistent with the rule of law and Ithala must lie in the bed it has made; and

(m) Ithala failed to meet the requirements of an interim interdict i.e. prima facie right and irreparable harm. It failed to establish a prima facie right entitling it to the mandatory interdict sought. On the facts alleged by it together with the facts alleged by the appellants which cannot be disputed, Ithala cannot obtain an order that permits it to have control of deposits notwithstanding that it does not have a banking licence or an exemption to conduct the business of a bank.[11] The interim interdict impermissibly grants it such control of bank accounts that contain deposits. Proof of a reasonable apprehension of irreparable harm and imminent harm eventuating should the order not be granted is a crucial

[11] *Webster v Mitchell* 1948 (1) SA 1186 (W).

requirement for the grant of an interim interdict as it is under s 18(1) and (3) of the Act. Where there seems to be potential harm to both parties, the court will weigh the balance of convenience cognisant of the normative scheme and democratic principles that underpin the Constitution.[12] The balance of convenience favours the depositors.

Ithala's submissions

[34] Ithala's case is that, without the main order being rendered operative pending the appeal, Ithala will be destroyed by the unlawful conduct of the appellants and the main order will be rendered nugatory. It is contended that the appellants were engaged in the following unlawful conduct:

(a) the RA unlawfully took over management and control of certain parts of Ithala's business operations, inter alia, the management and control of its treasury function, bank accounts, expenditure including approval and payment of its service providers;

(b) the conduct is unlawful under s 66 of the Companies Act 71 of 2008 ("the new Companies Act") and the PFMA;

(c) the conduct is prejudicial to the day-to-day operations of Ithala ; and

(d) the conduct is prejudicial to the business of Ithala and its relationship with its customers, service providers, shareholders and other stakeholders.

[35] It is further submitted that the liquidation proceedings launched and the freeze placed on all Ithala's bank accounts at Absa were all part of an orchestrated plan to circumvent the main order and render any appeal proceedings moot, leaving it with no relief. The liquidation application is based on the solvency report produced by the RA despite the Auditor General conducting a full audit on Ithala and consulting with the PA during the auditing process, finding Ithala to be solvent.

[36] From the aforesaid, Ithala argued that the institution of the liquidation application:

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[12] *Economic Freedom Fighters v Gordhan and Others* [2020] ZACC 10; 2020 (6) SA 325 (CC) para 40.

(a) opened the door for the RA to freeze Ithala's accounts and cite the liquidation application as a basis for doing so; and

(b) provided the PA with an opportunity to formulate a contrived argument that the RA's conduct is in line with the main order because he is allegedly protecting depositors from a run on the bank.

[37] According to Ithala, exceptional circumstances lie in the fact that:

(a) it will be left with no relief if the relief sought in this matter is not granted; will cease to operate and will be unable to adequately oppose the appeal of the main order;

(b) the RA is perpetuating an illegality in that he continues to act ultra vires and contravenes the Banks Act, the Companies Act, the Pension Funds Act, the Constitution, and the PFMA. His conduct also violates the rights of Ithala's employees under the Constitution and all applicable legislation;

(c) a significant number of Ithala's customers, most of whom are from poor and rural communities and who receive Sassa grants into their accounts, are left un-banked and unable to access their funds;

(d) in light of the freeze placed on Ithala's bank accounts by the RA, none of the customers (numbering 328 704), many of whom are Sassa grant recipients, at any of Ithala's branches (a network of 38 physical branches throughout KZN, located in urban, peri-urban and rural areas) currently have access to their money. Furthermore, Ithala's employees are also left to suffer by the RA who is refusing to release payment of their salaries; and

(e) in addition, the service providers with whom Ithala has long-term agreements that were concluded pursuant to a competitive public process are not being paid and this not only poses a risk to Ithala, but to the business of those service providers.

[38] Ithala submitted that it would suffer irreparable harm in that it:

(a) is unable to pay its employees and service providers. This makes it susceptible to legal proceedings brought against it by its employees and service providers, which would constitute irregular expenditure in terms of the PFMA;

(b) stands to be evicted from its leased properties;

(c) may be unable to adequately oppose any legal proceedings against the appellants, rendering the main order moot;
(d) may be unable to prosecute its appeal in the SCA;
(e) may be liquidated despite significant evidence proving it to be solvent; and
(f) its board may face possible criminal sanctions under the PFMA.

[39] Conversely, the argument that the appellants would suffer no irreparable harm if the relief sought is granted, is based on the following:

(a) the RA will still be in a position to challenge the main order, while Ithala is allowed to continue with its lawful business;
(b) the order of Leso AJ serves as a means to avoid any irregularities insofar as the PA is concerned; and
(c) there is no suggestion that the Minister of Finance and the provincial government will renege on their undertakings to support Ithala. There is a binding undertaking to guarantee all deposits issued by the Minister for all Ithala's depositors, notwithstanding that there is no credible audit report that shows that depositors are at risk.

[40] It is further argued by Ithala that the interdictory relief sought against Absa is a natural consequence of the relief granted in the main order to continue operating because Absa had not complied with the main order and subsequent to the main order Absa had been given unlawful instructions by the RA which it followed. Therefore, Ithala has no alternative other than to seek the interdictory relief against Absa.

[41] Ithala submitted that in terms of the interdictory relief being sought against Absa:

(a) it has a clear, alternatively prima facie right granted by the main order to be implemented and transact on its bank accounts for purposes of performing operational functions such as the human resource, treasury, marketing, finance, and any other operational functions;
(b) Ithala's irreparable harm has been set out above;
(c) the balance of convenience favours the granting of the order in that it will merely ensure that the main order is lawfully executed, instead of Absa continuing to follow the unlawful instructions of the RA; and

(d) Ithala has no alternative relief other than the interdictory relief sought to ensure that Absa complies with the main order.

[42] Furthermore, since Absa did not oppose the application, it is therefore not for the appellants to contend otherwise. Absa has not appealed the interdict against it, instead the appellants argue Absa's cause and purport to protect its interests.

[43] Insofar as the argument is raised by the appellants in regards to them freezing Ithala's accounts to ensure that Ithala's assets are not dissipated and to avoid a run on the bank that would have been caused by the PA's liquidation application, as well as their claim of entitlement to act contrary to the main order because of an application for leave to appeal, Ithala submitted in rebuttal thereof that:

(a) Ithala has never sought to dissipate assets to frustrate the RA from performing his functions and there is no evidence of any attempts nor are there any credible factual allegations made to that effect. In fact, for 13 months while the RA has been involved with Ithala, there have been no instances of dissipation of assets by Ithala;

(b) Ithala has been operating under the RA for 13 months without any threat of a depositors run. The appellants orchestrated the possible threat of a depositors run by instituting the liquidation application and immediately placing a freeze on its bank accounts;

(c) the plan was orchestrated and executed for purposes of circumventing the main order. This unlawful conduct was correctly censured by the court a quo in the s 18(3) order; and

(d) notwithstanding the institution of the liquidation application, no evidence is proffered to support the allegation that the pending liquidation (which is opposed by various parties including the provincial government which has provided a substantial guarantee) is likely to result in a run on Ithala . More so, considering it is an adequately capitalised financial institution and has never experienced a run before; the provincial government issued a R300 million cashback guarantee; the Minister of Finance/Treasury has undertaken to provide a guarantee for Ithala's depositors; and Ithala's shareholders have the means to cover any shortfall that may exist.

[44] Further to the above, it is argued that although the RA appealed the main order, it does not grant him carte blanche to avoid the order and engage in self-help while the issues are pending before court. The RA has arrogated to himself the power to ignore the main order and anticipate the outcome of this appeal, the SCA appeal and the liquidation application.

[45] On the issue of the RA having taken a "statutory decision" to freeze Ithala's bank accounts, which decision the appellants argue is valid until reviewed and set aside, Ithala argued that (as the court a quo found) such conduct was unlawful as the RA cannot merely take a new unlawful decision and then claim that it is lawful because it has not been set aside or reviewed. Such conduct flies in the face of the right against self-help. Furthermore, this "statutory decision" is of no force and effect in accordance with the principles outlined by the SCA in *Oudekraal*. The RA's conduct remains unlawful unless overturned on appeal.

[46] On the issue of the co-mingling of operational expenditure and deposits, as well as on the guarantee, Ithala stated that:

(a) it has clearly set out which bank accounts are used to pay employees and service providers – which are not affected by deposits;[13]

(b) the Minister of Finance is empowered by s 70 of the PFMA to issue a guarantee and has elected to exercise that power for purposes of securing Ithala's depositors;

(c) the third respondent has confirmed under oath the binding effect of the guarantee issued by the Minister of Finance. Therefore, there is no threat to depositors as Ithala merely seeks to pay its employees and service providers, which is in the best interest of itself and all of its customers (both deposit and non-deposit taking customers); and

(d) even if the form of the guarantee was in dispute, that does not affect the binding effect of the undertaking made by the Minister of Finance. All that needs to happen is that the Minister can be asked to furnish the guarantee in the correct form and that would be more appropriate than the total destruction of Ithala by the appellants.

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[13] See Annexure "PA1", volume 21, pages 2062-2063.

Submissions of the third and fourth respondents

[47] The third and fourth respondents contend that the court a quo plainly exercised a discretion in deciding the execution application and interference by a court of appeal is permissible only in narrowly circumscribed circumstances, namely where the discretion was not exercised judicially; the discretion was influenced by wrong principles or a misdirection on the facts, or the decision reached could not reasonably have been made by a court properly directing itself to all the relevant facts and principles.[14]

[48] They further submitted that significant, immediate and irreparable prejudice would arise relating to the provincial government's constitutional obligations regarding economic and rural development; and interference with the requirement of inter-governmental co-operation in terms of s 41 of the Constitution, if the execution order were to be set aside.

[49] Ithala is established in terms of the IDFC Act to facilitate the extension of credit for urban and rural economic development. Its functions are not confined to the taking of deposits. The deposits received are merely one source of funds to be used in the extension of credit.

[50] The third and fourth respondents submit that the actions of the RA in seizing control of Ithala's assets and effectively of all its operations prevent Ithala from carrying out its lawful function which falls outside the purview of the PA, and thus impedes the performance by the provincial government of one of its key constitutional functions. The actions, even if found to be well-intentioned, give rise to a constitutional crisis that undermines the very structure of the South African state. In particular, the RA's actions contravene s 41*(e)*, *(f)*, *(g)* and *(h)* of the Constitution.[15]

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[14] *Public Protector v South African Reserve Bank* [2019] ZACC 29; 2019 (6) SA 253 (CC) para 144; *Minister of Social Development Western Cape and Others v Justice Alliance of South Africa and Another* [2016] ZAWCHC 34 ("*Justice Alliance*").

[15] *Maccsand (Pty) Ltd v City of Cape Town and Others* [2012] ZACC 7; 2012 (4) SA 181 (CC) para 47.

[51] The further submission was that Ithala stands in a different position to the class of persons ordinarily subject to directives issued in terms of s 83(1) of the Banks Act. Therefore, in granting the s 18(3) order the court a quo acted in upholding the Constitution and restraining the unconstitutional action of the appellants.

[52] The contention of the third and fourth respondents is that the need to take control of Ithala's assets on the basis that this is needed to safeguard depositors and to protect the *concursus creditorium* overlooks the fact that, if Ithala is ultimately liquidated, there is a statutory guarantee of its liabilities (and thus no irreparable harm would ensue). Furthermore, Ithala will not fall under the control of the liquidator upon winding-up (ss 32(1) to (3) of the IDFC Act). There is no evidence in the record that the IDFC would be unable to settle Ithala's liabilities to depositors.

[53] Furthermore, the powers which the RA purports to exercise in terms of s 84(1A) of the Banks Act insofar as these relate to taking control of all of Ithala's assets and in effect its operations, conflict with the provisions of the IDFC Act. That is why the court a quo distinguished the facts of this case from those set out in *Kruger v Joint Trustees of the Insolvent Estate of Paulos Bhekinkosi Zulu and Another*.[16]

[54] They submitted further that, to the extent that there is a conflict that cannot be resolved through reading down the provisions of s 84 of the Banks Act, then the provisions of the IDFC Act pertaining to Ithala carrying on the business of a credit provider for or on behalf of the IDFC, and in order to give effect to urban and rural development within KwaZulu-Natal, must prevail. That it be so, is because the IDFC Act only subjects Ithala to the regulation of the first appellant and the Banks Act insofar as its deposit taking operations are concerned. Ithala's other businesses are not subject to regulation under the Banks Act.

[55] Therefore, it cannot be said that legislation authorising a repayment administrator to take control of all of Ithala's assets and other aspects of its business,

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[16] *Kruger v Joint Trustees of the Insolvent Estate of Paulos Bhekinkosi Zulu and Another* [2017] 1 All SA 1 (SCA) ("*Zulu*").

beyond those pertaining to its deposit-taking activities, falls within the scope of matters contemplated in s 146(2) and (3) of the Constitution.

Evaluation and analysis

[56] I now turn to do the evaluation and analysis of the matter. The history and submissions given were extensive and comprehensive.

[57] It is common cause that Ithala is not a bank as defined in and registered under the Banks Act. Instead, it operated and conducted deposit-taking activities by virtue of a series of exemption notices, promulgated by the PA and its predecessor-in- title, the Registrar of Banks, which stipulated that such activities shall be deemed to be the business of a bank. That regulatory regime ended after the PA issued a Final Exemption Notice on 12 July 2022. This notice contemplated that Ithala would wind down its deposit-taking activities, alternatively transfer same to a registered bank or apply for a banking licence.

[58] Paragraph 4.8 of the Final Exemption Notice contemplated the appointment of a repayment administrator if Ithala failed to:

'(a) comply with all of the conditions or requirements in this Notice and not remedy the same within 48 hours or if the Prudential Authority withdraws this Notice; or

(b) obtain authorisation to establish a bank or mutual bank by 30 June 2023.'

[59] The lapse of the Final Exemption Notice had the effect that Ithala was not permitted to continue with its deposit-taking activities beyond 15 December 2023.

[60] In granting Ithala the s 18(3) relief (the execution order) it is evident that the court a quo granted further relief (as contained in paragraphs 3, 4, 5 and 6 of the order above) pending the appeal of the main order. It seems to me that the court thus went beyond the parameters of s 18(1) and (3) in making the order.

[61] I hold that view for the following reasons:

(a) paragraphs 3, 4, 6.1 and 6.3 of the execution order, are directed at Absa. However, Absa was not a party to the proceedings that culminated in the judgment and order of 13 November 2024;

(b) paragraph 5 of the order serves as an interim interdict pending the liquidation proceedings, which does not form part of the appeal proceedings or the main application or the counter-application;

(c) paragraph 5 of the order serves as an anticipatory breach of s 2 of the Insolvency Act 24 of 1936, read with s 341 (2) of the old Companies Act, in that the order facilitates the disposition of Ithala's property, after the winding-up has commenced and after the RA has been appointed to take possession and control of all of Ithala's assets in terms of s 84(1A)*(b)*(i) of the Banks Act; and

(d) paragraph 6.2 serves as a final interdict against the RA, vis-à-vis the service providers and the continuation of their services.

[62] It is necessary to have regard to the factors to be considered before any such order in terms of s 18(3) of the Act can be granted which is summarised as follows:

(a) the suspension of the court order pending an appeal is the norm;

(b) an execution order pending an appeal is extraordinary relief for which an applicant has to make out a case on the facts; and

(c) this requires the applicant to:

  (i) demonstrate that exceptional circumstances exist which warrant a departure from the norm; and

  (ii) prove, on a balance of probabilities, that it will suffer irreparable harm if the execution order is not granted, and the respondent will not suffer irreparable harm should the execution order be granted.

[63] Failure on the part of the applicant to prove any one of these requirements is fatal to the application. Facts may be relevant to both the requirements of exceptional circumstances and irreparable harm. The position as to whether the court retains a discretion to grant the relief and the role of prospects of success in the exercise of that discretion remains unsettled. However, it would seem as though prospects of success does not take centre stage in the determination of an application for an execution order

in terms of s 18(1) and (3) of the Act, albeit that the excerpt in *Afriforum* adopting the reasoning of the full court in *Justice Alliance* was obiter.[17]

[64] Even though the comments in *Afriforum* are to be regarded as *obiter dicta*, they hold persuasive power, and I am in agreement that the approach of the full court in *Justice Alliance* be followed. Moreover, *Afriforum* confirmed that the exceptionality of an order in terms of s 18(1) and (3) of the Act is underscored by the wording of s 18(4), and that a heavy onus rests on an applicant to satisfy the requirements.

[65] Having regard to the peculiar facts of this matter, counsel for Ithala drew this court's attention to the following facts which he submitted met the threshold of exceptional circumstances and irreparable harm:

(a) the RA's conduct in placing an embargo on Ithala's accounts has placed it in a position in terms of which it cannot pay wages to its employees or pay its service providers;

(b) Ithala will cease to operate and will be unable to oppose the RA's appeal of the main order and the appeal will be rendered moot;

(c) it will cause Ithala to breach its statutory obligations under, inter alia, labour and social security legislation; and

(d) a significant number of Ithala's customers, most of whom are from poor and rural communities and who receive Sassa grants into their bank accounts, will be left un-banked and unable to access their funds.

[66] This is to be considered against the backdrop of the intervention of the provincial government, and its purported guarantee or promised guarantee of Ithala's liabilities. The provincial government did not rely on this alleged guarantee and this was not pursued in argument by its counsel, save that he submitted that upon any liquidation of Ithala, its assets, liabilities, rights, duties and obligations, including any unspent portion of funds received, would fold back into Ithala Development Finance Corporation Limited, in terms of s 32(3) of the IDFC Act.

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[17] *University of the Free State v Afriforum and Another* [2016] ZASCA 165; 2018 (3) SA 428 (SCA) paras 14-15.

[67] Ithala, however, relied on this alleged guarantee for the purposes of establishing the second leg of the test, namely that the appellants would not suffer irreparable harm. Even if one foregoes the issue of whether it actually constitutes a guarantee or simply constitutes a promise or undertaking, it cannot be considered a competent guarantee upon a consideration of s 70 of the PFMA. The guarantee is not one that:

(a) binds the National Revenue Fund (s 70(1)*(a)*); or

(b) binds a national public entity referred to in s 66(3)*(c)*, in respect of a financial commitment to be incurred by that entity.

[68] A further problem is that the order facilitates the perpetuation of Ithala's illegal operation as a deposit-taking institution. Ithala has not taken deposits since the RA placed an embargo on its accounts in January 2025, and that position has remained because, notwithstanding the main order of 13 November 2024 and the s 18(3) order granted on 9 May 2025, the RA (as well as the PA) have been granted leave to appeal against the main order to the SCA and they have noted an automatic appeal against the s 18(3) order to this court, in terms of s 18(4) of the Act. That has served to suspend the operation of those orders.

[69] If the appeal is dismissed, Ithala will operate under the regime created by the s 18(3) order which does not prohibit Ithala from taking deposits. Paragraph 2 of the main order is framed in declaratory terms, namely that the RA may not, generally speaking, interfere with Ithala's operations and management, save for deposit-taking activities. The order, however, does not interdict Ithala from actually accepting deposits.

[70] The s 18(3) order, in other respects, emasculates the RA in his ability to deal with deposits, both deposits currently held and those which will be made in the future, by virtue of the interdictory relief contained in paragraph 6 thereof. Paragraph 6.3 of the order specifically interdicts the RA from issuing any instructions to Absa which will have the effect of preventing Ithala's ordinary creditors from fulfilling their financial obligations (i.e. making payments to Ithala by depositing funds by electronic transfer, debit orders or cash deposits as the case may be).

[71] The order, therefore, countenances and facilitates Ithala's deposit-taking activities, notwithstanding the expiry of the Final Exemption Notice. The order has the practical effect of reducing the RA's role to an oversight functionary without any power to deal with the deposits. This undermines his statutory obligation under ss 84(1A)*(b)*(i), 84(4)*(a)*, *(b)* and *(d)* of the Banks Act and, therefore, contradicts the statute.[18]

[72] It is important to bear in mind that payment (by creditors or the provincial government or the IDFC) is a bilateral juristic act requiring the agreement or co-operation of both parties.[19] The detailed definition of a deposit in s 1 of the Banks Act only serves to underscore this.

[73] Ithala cannot adopt a position that it does not actively seek to continue taking deposits, as opposed to the positive act of instructing its bankers to prevent any deposits from being accepted into its bank accounts. It has secured the protection of the s 18(3) order to legitimise and facilitate the continuation of its deposit-taking activities. It may not actively market for, or take positive steps to encourage such deposits; however, such deposits (e.g. those from its creditors or from the provincial government) will be made without any further actions on its part.

[74] It must follow that this illegality should have played a factor in the court a quo's consideration into whether either exceptional circumstances existed, which warranted a departure from the norm or whether the RA and the PA, respectively, would suffer irreparable harm should the execution order be granted, facilitating the continuation of such illegal deposit-taking activities. Accordingly, the implementation of the execution order would result in such an illegality. It is this factor, which the appellants referred to when they submitted that the court failed to consider the public interest factor. This invokes the maxim *ex turpi causa non oritur actio*. The rule is absolute with no exceptions even if there has been partial performance in the past.[20]

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[18] *Knoop NO and Another v Gupta (Execution)* [2020] ZASCA 149; 2021 (3) SA 135 (SCA) paras 27 (d)] and 33-34.
[19] *Vereins - und Westbank AG v Veren Investments and Others* 2002 (4) SA 421 (SCA) paras 11 and 38. See also R Sharrock *The Law of Banking and Payment in South Africa* (2016) at 195.
[20] *Jajbhay v Cassim* 1939 AD 537.

[75] Counsel for Ithala sought to persuade this court that the public interest, in this instance, is the dire consequences that will eventuate to Ithala's customers, pensioners and grantees who draw their pensions and grants, respectively, from their Ithala bank accounts, Ithala employees and its service providers. However, the public interest must be more broadly framed and must, of necessity, include the rule of law and that any order granted in terms of s 18(3) of the Act must, as a matter of principle, respect the rule of law and not facilitate or perpetuate an illegality.[21]

[76] Much of what has been argued by the respondents in this matter amounts to setting out the circumstances which they contend constitute exceptional circumstances however, and fundamentally, they fall foul of the principle of *ex turpi causa* and the *condictio ob turpem vel iniustam causam* as enunciated in *Cool Ideas 1186 CC v Hubbard and Another*.[22] Fairness and convenience are not grounds to enable the respondents to sacrifice the principle of legality to enable Ithala to continue with any activity which would amount to unlawful conduct.

[77] Exceptional circumstances do not arise in the situation where the exceptional circumstance will result in an unlawful act. The court a quo, unfortunately, failed to consider this when granting the order.

[78] To the extent that there is a concern about the financial consequences of upholding the appeal, the following considerations are relevant and should be taken into account:

(a) section 84(1A)*(b)*(ii) of the Banks Act places a moratorium on all legal processes;
(b) the provincial government promised to honour Ithala's obligations;
(c) Ithala could have finalised arrangements with the RA to transfer deposits across to a third party bank to ring-fence it from becoming co-mingled with its other funds, if any; and
(d) Ithala has known that this situation would come about upon receipt of the Final Exemption Notice, which made it abundantly clear that Ithala's deposit-taking

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[21] *Ntlemeza v Helen Suzman Foundation and Another* [2017] ZASCA 93; 2017 (5) SA 402 (SCA) paras 46 and 47.
[22] *Cool Ideas 1186 CC v Hubbard and Another* [2014] ZACC 16; 2014 (4) SA 474 (CC).

activities would come to an end on 15 December 2023, and that it needed to make provision for this eventuality.

[79] Ithala adopted a supine approach as to such an eventuality and it now seeks to rely on the consequences of this approach as the grounds for exceptionality and irreparable harm.

[80] Having found that it is necessary to consider the prospects of success of the respective applications in the appeal, I now turn to deal with this.

[81] It is necessary to firstly consider the provincial government's submissions, in that it has raised a collateral challenge to the proceedings. It alleges that the appointment of the RA was invalid. However, the provincial government did not refer to any evidence serving before this court, save to allege in its heads of argument that it has raised a frontal challenge to the validity of the RA's appointment under s 84 of the Banks Act. Reference was made to a review; however, the details of this review were not furnished to this court.

[82] This is to be considered against the backdrop of Ithala's review proceedings in the North Gauteng High Court (per Moshoana J) which was dismissed with costs. Secondly, the provincial government instituted its own review proceedings in the North Gauteng High Court (per Millar J) which was also dismissed with costs.

[83] This, of course, is academic because it is trite that even where an administrative act, such as the appointment of a RA, is invalid, it still has lawful consequences which courts will respect until such time as the appointment has been set aside.[23] Accordingly, there is simply no basis upon which it could be contended that either the court a quo or this court should take into account the prospects of any review proceedings, in arriving at a decision as to whether the execution order should be granted. A final death knell to this contention, is that the consent order, which

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[23] *Oudekraal Estates (Pty) Ltd v City of Cape Town and Others* 2004 (6) SA 222 (SCA) para 26; *Merafong City v AngloGold Ashanti Ltd* [2016] ZACC 35; 2017 (2) SA 211 (CC) paras 41-44.

confirmed the appointment of the RA and specifically declared his entitlement to take steps as contemplated in s 84 of the Banks Act, is extant and not subject to any appeal.

[84] Whilst Ithala's application is pending in respect of the Gauteng proceedings, what is not in dispute is the consent order of Leso AJ. What is furthermore not in dispute is that Ithala had no right to continue taking deposits beyond 15 December 2023 when the Final Exemption Notice expired.

[85] It is also necessary to bear in mind that the present predicament and circumstances in terms of which the parties find themselves is not a situation which comes as any surprise to Ithala's board. The affidavits and arguments presented suggest that the present circumstances arise out of the machinations of the RA appointed by the PA.

[86] The inflammatory language used is misdirected as Ithala's board knew full well for approximately 20 years that the South African Reserve Bank (through its functionary – the then Registrar of Banks and his successor in title, the PA) required Ithala to not only ring-fence the deposit-taking portion of its business, but also to set up a separate independent entity which could be registered as a bank.

[87] Notwithstanding such advice, over that period, Ithala's board either through its arrogance or hubris simply ignored the injunctions of the Reserve Bank and PA and continued to operate as a deposit-taking institution. The board knew that the exemptions were going to end and could be under no illusion as to the finality (and the insistence by the PA) that the exemptions would end. The exemption granted in July 2022 clearly set out that this was to be the final exemption and that after December 2023 there would be no further exemptions.

[88] Section 84 of the Banks Act has as one of its primary injunctions, that "the repayment administrator shall recover and take possession of all the assets of the person subject to the relevant direction…". Both in the court a quo and before us, it has been argued that the taking of possession relates only to the deposit-taking portion of the business of Ithala and such other business as conducted by Ithala can and should be separated.

[89] In making this distinction, Ithala and the court a quo sought to distinguish and differentiate the assets of Ithala on the basis of a Ponzi scheme, whereas Ithala's deposit-taking activities have been legal, up to 15 December 2023. The SCA in *Zulu*[24] clearly set out that the words "all assets" in s 84(1A)*(b)*(i) of the Banks Act is conclusive regarding this issue, and it stated:

'Regarding the contention, by Mr Zulu, that only assets acquired through the operation of the illegal scheme were liable to attachment, this argument flies in the face of the provisions of section 84(1A)*(b)*(i) of the Banks Act. The dictionary meaning of "all" is: "The whole amount, extent, substance, or compass of; all that is possible; [t]he entire number of, without exception". The use of the words "all assets" in section 84(1A)*(b)*(i) is conclusive on the issue. There is no basis for distinguishing between assets acquired through the operation of the unlawful banking business and those acquired innocently. The source and manner of acquisition is immaterial. In fact, it seems to me that even section 84(4)*(b)* does not exclude honestly acquired assets from consideration for realisation for purposes of raising repayment funds. The section merely sets out, as one of the duties of the repayment administrator, the taking of reasonable steps to expedite repayment of money. Such steps may include liquidation of the assets into which money unlawfully obtained had been converted. But such a step may not be necessary where repayment funds are readily available.' (Footnote omitted.)

[90] Both in the court a quo and before us, Ithala has sought to distinguish the *Zulu* matter and the instant case based on a Ponzi scheme and an exemption. This argument ignores the fact that after December 2023, Ithala took deposits and thereby invoked and breached the relevant section of the Banks Act. It makes no difference whether the deposit-taking was pursuant to a Ponzi scheme or a failed attempt to obtain an exemption. Once deposit-taking is performed by an entity which has no exemption or licence, then it is operating an unlawful banking business.

[91] This is precisely what Ithala has been doing. The so-called distinction is artificial. Ithala cannot contend for the right or take deposits without a licence. It matters not whether it is a Ponzi scheme or not. The breach is of the Banks Act and the unlawful taking of deposits.

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[24] *Kruger v Joint Trustees of the Insolvent Estate of Paulos Bhekinkosi Zulu and Another* [2017] 1 All SA 1 (SCA) para 36.

[92] Ithala is not insulated from the operations of the Banks Act, simply because it is a government entity regulated by its laws. The wording used in s 84 of the Banks Act is "recover and take possession of all assets" which mirrors the language of s 391 of the old Companies Act where the words used are "recover and reduce into possession all the assets".

[93] *Zulu* concerns itself with the notion of "all assets", however, when it comes to recovery and taking possession of such assets, the intention of both the Banks Act and the old Companies Act is clear, namely that this is recovery in possession to the exclusion of all others. This is a continuing and ongoing duty and to that end, the RA has an ongoing statutory duty to retain the bank accounts in his possession. The re-opening of the bank accounts and their operation whether it was pursuant to the failure to obtain an interim order or whether it was due to the s 18(1) and (3) application is irrelevant.

[94] The obligation to secure assets into his possession is a continuing and ongoing obligation of the RA and the continued operation of the bank accounts for other purposes defeats the object of the statute.

[95] The prospects of success on appeal must be considered in the paradigm of this statutory framework, in particular, the statutory obligation on the part of the RA to recover and take possession of all assets, both legally and illegally acquired, which is an overriding, ongoing and definitive one. Accordingly, there can be no serious argument to be made that the RA was not entitled to take steps under s 84 of the Banks Act to secure the assets and take steps to repay the deposits as contemplated in the section.

[96] Accordingly, there are cogent and more than reasonable prospects of success in the appeal for the RA and the PA, respectively. This ought to have been taken into account in the melting pot of considerations and factors to be considered as to whether or not the execution order should have been granted.

[97] Consequently, the s 18(3) execution order cannot stand.

[98] This finally brings me to the status *quo ante*. The outcome of this appeal should not sound a death knell to Ithala as contemplated. Ithala is not supposed to die and should not be left to die pending the final outcome of the SCA appeal. It undeniably serves an important purpose in the province of KwaZulu-Natal.

[99] The status quo which existed before the main order appealed can be revived without the illegality which would have ensued upon the lapsing of the Final Exemption Notice on 15 December 2023. I say so for the following reasons:

(a) in terms of the consent order (paragraph 2.2) which remains extant, Ithala was not entitled to continue any deposit-taking activities and to deal with any deposits already received "otherwise than under the direction of a repayment administrator appointed by the Prudential Authority and any repayment – plan put in place";

(b in paragraph 2.3 of that order, the RA is only empowered to recover and take possession of all the deposits taken by Ithala (not control of all the assets of Ithala). So, in terms of this order, the RA's powers were limited to the preservation of deposits;

(c) in terms of paragraphs 3.2 of the order, Ithala and the RA were to co-operate and work jointly towards devising a plan for the repayment of deposits to depositors (an alternative plan of action as contemplated by s 84(1) of the Banks Act); and

(d) lastly, in terms of paragraph 3.3 of the order, the RA was to repay deposits to depositors in accordance with the agreed repayment plan.

[100] If this order is genuinely put into operation, Ithala should be able to continue operating its normal business with the RA in control of the deposits taken by Ithala with the necessary co-operation at delineation of the accounts co-mingled. Perhaps the migration of deposits to another bank would help Ithala's cause. In short, Ithala has to work with the RA until the outcome of the SCA appeal.

Order

[101] The following order is therefore issued:

1.The appeal is upheld.

2. The section 18(3) execution order issued on 9 May 2025 is set aside with costs.
3. The first, third and fourth respondents to pay the costs of two counsel employed in respect of each of the appellants on Scale C jointly and severally the one paying the others to be absolved.

Nkosi DJP

Harrison J

Saks AJ

CASE INFORMATION

DATE OF HEARING	:	25 JULY 2025
DATE OF JUDGMENT:		15 AUGUST 2025

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